

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ALEXANDER PANEK,

Petitioner,

v.

**5:04-CV-94
(FJS)**

UNITED STATES OF AMERICA,

Respondent.

APPEARANCES

OF COUNSEL

ALEXANDER PANECK

Reg. No. 08311-052

LSCI Allenwood

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White Deer, Pennsylvania 17887-1000

Petitioner *pro se*

**OFFICE OF THE UNITED STATES
ATTORNEY**

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Attorneys for Respondent

EDWARD R. BROTON, AUSA

SCULLIN, Chief Judge

ORDER

Petitioner seeks a certificate of appealability (“COA”) so that he may appeal from the Court’s March 1, 2005 Memorandum-Decision and Order. *See* Dkt. No. 10. The Court may only issue a COA if Petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(1). The only issue that Petitioner raises in his application for a COA is whether the Court violated his Fifth and Sixth Amendment rights by enhancing his sentence

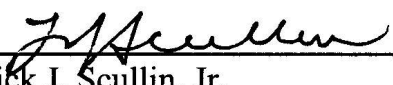
without submitting the factual predicates of the enhancement to a jury. Although he does not refer to it, Petitioner's position relies upon the Supreme Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005). However, the Second Circuit has clearly held that "*Booker* is not retroactive, *i.e.*, it does not apply to cases on collateral review where the defendant's conviction was final as of January 12, 2005, the date that *Booker* was issued." *Guzman v. United States*, 404 F.3d 139, 144 (2d Cir. 2005). Consequently, Petitioner has not made a substantial showing of the denial of a constitutional right.

Accordingly, after carefully considering the file in this matter, Petitioner's submissions, and the applicable law, and for the reasons stated herein, the Court hereby

ORDERS that Petitioner's application for a certificate of appealability is **DENIED**.

IT IS SO ORDERED.

Dated: June 30, 2005
Syracuse, New York



Frederick J. Scullin, Jr.
Chief United States District Court Judge